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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 73-1769

CARL THOMPSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Carl Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 12, 1974, affirming his conviction and the order of that Honorable Court entered on April 24, 1974, denying his petition for rehearing.

CITATIONS TO OPINIONS BELOW

The opinion and order of the Court of Appeals are not reported and appear in the Appendix attached hereto as Appendix A and B, respectively. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction in the criminal proceeding below was filed on March 12, 1974. A timely Petition for Rehearing was denied on April 24, 1974. This petition for certiorari is filed within thirty days of that last date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the refusal of the Government, after appropriate demand and offer by the defense, to record the Grand Jury proceedings required that the District Court, upon timely motion, dismiss the indictment.

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the Fifth Amendment to the United States Constitution. It is printed in I.U.S.C. XLVI.

STATEMENT OF THE CASE

Petitioner, Carl Thompson, together with four codefendants, were indicted by the Grand Jury on July 14, 1971 for one count of conspiracy to commit marijuana offenses in violation of Title 21, United States Code, Section 176(a) (C.T. 1-4). He pled not guilty (C.T. 6) and moved to dismiss the indictment for failure by the government to record Grand Jury testimony (C.T. 22-35), which motion was denied (C.T. 108). The case then proceeded to trial before a jury as to petitioner Thompson and one remaining co-defendant (C.T. 152), both of whom were found guilty as charged (C.T. 213, 216). Petitioner Thompson's motion for a new trial and judgment of acquittal was denied (C.T. 223-226, 229-232, 247, 262, 273), and he was ultimately sentenced to five years imprisonment. Petitioner

then filed a timely notice of appeal (C.T. 277), and was admitted to bail pending appeal in the amount of $35,000.00 (C.T. 303). Petitioner is presently at liberty upon said bail, pending filing, consideration, and disposition by this Honorable Court of the instant petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is In Direct Conflict With Other Decisions of The Ninth Circuit Court of Appeals Concerning Grand Jury Recordation and Operates to Deprive Defendants of Due Process of Laws.

DISCUSSION

While a reading of the Reporter's Transcript of the proceedings in the Court below reveals that certain Grand Jury Transcripts were made available to defense counsel for the purpose of cross examination, a careful reading of the record below clearly establishes that when the Grand Jury indicted petitioner no reporter was

present and consequently it is presently unknown what specific testimony was presented to that specific Grand Jury and upon what evidence that specific Grand Jury relied in returning that indictment.

The Grand Jury testimony, portions of which were given to defense counsel prior to cross-examination, were of ancient vintage. In all likelihood that testimony had been originally presented to an earlier and different Grand Jury than the specific Grand Jury which ultimately indicted the petitioner. The specific Grand Jury which ultimately indicted the petitioner may have had before it only the testimony of a Government agent who testified only as to the contents of the prior testimony given before one or more prior Grand Juries, and this testimony of that agent may well have been selective only of the information which was of aid to the prosecution, with the deletion of testimony which might have been favorable to the defense.

All of these frailties flow, of course, from the refusal of the office of the United States Attorney to record the specific testimony presented to the specific

Grand Jury which ultimately indicted petitioner.

The opinion of the Ninth Circuit however failed to recognize the existence of this problem when it stated that "Given the presence here of substantial direct evidence before the Grand Jury, such a showing [of abuse of discretion of the trial court in failing to dismiss an indictment procured partially by incompetent evidence] has not been made." The fault of this reasoning is that there is nothing in the record to support any finding that substantially direct evidence was placed before the Grand Jury which indicted petitioner, and indeed no such finding can ever be made because that testimony, although requested to be recorded, was never recorded.

The opinion of that Court, sought to be reviewed here, simply fails to realize that failure to record as required by United States v. Thoresen (9th Cir. 1970) 428 F.2d 654 and United States v. Price (9th Cir. 1973) 474 F.2d 1223, should not be permitted to shield the likelihood of selective hearsay testimony, which would constitute error under United States v. Arcuri (2nd Cir.

1969) 405 F.2d 691 or prevent the possibility of defense ever meeting the requirements of United States v. Fox (9th Cir. 1970) 425 F.2d 996.

It should be noted here and it cannot be overemphasized that the Government in its formal opposition to the Motion to Dismiss the indictment (C.T. 73-76) apparently conceded that no Court Reporter was present when testimony was given before the specific Grand Jury which indicted the petitioner.

ARGUMENT

In Dennis v. United States (1966) 384 U.S. 855, this Honorable Court was confronted with the issue whether it was reversible error under the circumstances there present for the trial court to deny a defense motion for production of the Grand Jury testimony of four Government witnesses. The Court in upholding the contention noted preliminarily that in United States v. Proctor & Gamble Co., 356 U.S. 677, it stated that "'problems concerning the use of the Grand Jury transcript at

the trial to impeach a witness, to refresh his recollection, to test his credibility ****' are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.'" (384 U.S. at 871). Emphasizing that "disclosure, rather than suppression, of relevant material ordinarily promotes the proper administration of criminal justice" the Court ruled that the showing made by the defendants of the following circumstances was substantially beyond the minimum requirements of a "particularized need":

> "1. The events as to which the testimony in question related occurred between 1948 and 1955. The grand jury testimony was taken in 1956, while these events were relatively fresh. The trial testimony which petitioners seek to compare with the 1956 grand jury testimony was not taken until 1963. Certainly, there was reason to assay the latter testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury.

"2. The motions in question involved the testimony of four of the eight government witnesses. They were key witnesses. The charge could not be proved on the basis of evidence exclusive of that here involved.

"3. The testimony of the four witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements.

"4. Two of the witnesses were accomplices, one of these being also a paid informer. A third had separated from the union and had reasons for hostility toward petitioners.

"5. One witness admitted on cross examination that he had in earlier statements been mistaken about significant dates."

Holding that the above showing entitled the defendants to disclosure and at a time when those witnesses were available for cross examining, the convictions were reversed.

That Dennis may have had a greater impact than the narrow question there resolved was later intimated by the Ninth Circuit in United States v. Thoresen (9th Cir. 1970) 428 F.2d 654. There the defendants, expecting to be reindicted, served on the United States Attorney a demand letter stating that the defendants would seek a transcript of any future grand jury proceeding, requesting that a court reporter should therefore be in attendance, and offering to pay the expense of such. At the same time, the defendants moved for a court order compelling the same, which order was denied on the basis that the defendants were not entitled to a grand jury transcript as a matter of right. Defendants were thereafter reindicted following grand jury proceedings without a reporter, and defendants subsequent motion for a transcript of said proceedings was denied for the reason that as no reporter

had been present, it would not be possible to provide such a transcript.

In this procedural context the Ninth Circuit gave notice of what might be in store in the future, as follows:

> "The rule prevailing in the Ninth Circuit is that the recording or transcribing of grand jury testimony is 'permissive, not mandatory.' Loux v. United States, 389 F.2d 911, 916 (9th Cir. 1968). See also Reyes v. United States, 417 F.2d 916, 918 (9th Cir. 1969); Jack v. United States, 409 F.2d 522, 524 (9th Cir. 1969). But the fact that a particular discovery procedure is 'permissive' rather than 'mandatory' does not mean that permission may be arbitrarily denied. Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceedings if an indictment is returned and offers to pay the expense of having a reporter in attendance or shows

inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance.

"However, we are unaware of any precedent in this Circuit for the dismissal of an indictment because of the Government's refusal to honor an advance request that a court reporter be present. We are therefore unwilling to invoke such a rule in this case absent a clear indication of prejudice, although we can give no assurance that such a rule may not be applied under similar circumstances in the future. We do not believe that there is here a clear indication of prejudice to defendants resulting from the unavailability of the grand jury transcript which they sought."

That notice came to fruition in United States v. Price (9th Cir. 1973) 474 F.2d 1223. There, prior to indictment, appellants moved for an order compelling recordation of the anticipated grand jury proceedings which motion was denied. The

response of the Court of Appeals was as follows:

> "We adhere to the principles stated in Thoresen, and we now implement them by holding that the district court must exercise its discretion in passing upon a preindictment motion for recordation of grand jury proceedings and that a district court abuses its discretion in denying the motion of parties situated as were appellants, in absence of a Government showing that it has a legitimate and compelling interest to be served by nonrecordation. The Government cannot meet its burden by resort to the secrecy rubric. Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means.
>
> "Our holding, in part, is predicated on our recognition in Thoresen that recordation of grand

jury proceedings should be routine and nonrecordation should be permissible only in exceptional circumstances. It is also based on our awareness that a less strict rule invites defeat of the principles enunciated in Dennis v. United States (1966) 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973.

"Dennis held that it was reversible error to deny petitioners' motion for disclosure of certain portions of a grand jury transcript for which the petitioners had shown a particularized need. The Court reasoned that the broadened discovery available to defendants is 'entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.' (384 U.S. at 870, 86 S.Ct. at 1849. See also U.S. Industries, Inc. v. United States District Court (9th Cir. 1965) 345 F.2d 18.)

"When Price and Coffey moved for disclosure of portions of the grand jury proceedings, their showing of particularized need may not have been adequate. However, even if their showing had been overwhelming, it would have been futile because the nonexistent is nonproducible, and the Government had arranged that no record be made.

"Government has known at least since Thoresen that a failure to record grand jury proceedings after notice that a defendant wants recordation could jeopardize a prosecution. In Thoresen we declined to dismiss the indictment because the Government had had no prior Circuit warning that its refusal to record could bring its case to grief. The warning was given, and it has been ignored. We are unwilling to go so far as to order dismissal of the indictments of Price and Coffey because we are not convinced that they adequately demonstrated prejudice. (428 F.2d

at 666.) However, we will vacate their sentences and on remand permit them a further opportunity to expand the record by offering additional evidence bearing on the issue."

Price parallels the instant proceeding in all material respects. Here defense counsel authorized by defendant Thompson informed the office of the United States Attorney on April 9, 1971, and April 12, 1971, that in view of the then upcoming grand jury proceeding it was demanded that all grand jury proceedings related to Mr. Thompson be transcribed by a stenographic reporter and that, in connection therewith, the defense would pay said reporter's fees or supply a reporter at its own expense (C.T. 22-35). The offer was expressly made a continuing offer (C.T. 22-35). As stated by counsel in said communication, the rationale of the request was that:

"It is the policy of the United States Attorney to not record the testimony of Federal or State law enforcement officers, even though

a stenographer and funds therefor are available, for the reasons that the United States Attorney does not wish to make such testimony available by discovery proceeding, or at the time of trial as impeaching evidence, or as the basis of a motion to dismiss the indictment based upon false, misleading hearsay or incompetent testimony by such law enforcement officers. The testimony of such witnesses is usually hearsay and the Grand Jury is not made aware that precipient witnesses are available to testify on these same subjects.

"In this particular case, I have reason to believe that several informant witnesses of doubtful character and veracity may be questioned by your office before the Grand Jury in regard to Mr. Thompson. It is therefore imperative that the testimony of all persons who testify before the Grand Jury regarding Mr. Thompson from this day forth be preserved."

The offer was rejected, however, and testimony was given before the Grand Jury without recordation which testimony was the basis of the indictment returned. This is the precise evil at which both Thoresen and Price were directed and defendant here is entitled to the benefit of the rule therein proposed to the effect that the Government's refusal to honor an advance request that a court reporter be present at the Grand Jury proceeding, without expense to the Government, should result in a dismissal of the indictment.

That this is the proper result in the instant case is likewise supported by the reasoning of the Ninth Circuit in Lenske v. United States (9th Cir. 1967) 383 F.2d 20, 24, 25, concerning the practice, employed by the Government in the case at bench, of not having the testimony of law enforcement officers before the Grand Jury transcribed by a court reporter:

> "Another incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the

prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The Court directed Government counsel to check the record. Later Government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the

testimony of the Special Agent and the Revenue Agent was not transcribed.

"Whether Government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to Government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross-examination. It was a clever scheme, but one sided and unfair, and in complete violation of the teachings of Holland v. United States, supra." (emphasis added).

This practice of the United States Attorney in not having the testimony of law enforcement officers before the Grand

Jury transcribed, for the reasons set forth in the Motion to Dismiss below, denied the defendants their constitutional right to indictment by a Grand Jury, the effective aid of counsel, due process of law, and a fair trial. See also United States v. Gramoline, 301 F. Supp. 39, (R.I. 1969), and cases cited therein. The above described procedure is likewise a denial of fundamental basic due process and should not be tolerated by the Court. See United States v. Thoresen, 428 F.2d 654, 666-670 (9th Cir. 1970).

It is further submitted that the practice of the United States Attorney in using hearsay evidence to indict a defendant when direct evidence is available should not be tolerated by this Court for two reasons:

First, it habituates the Grand Jury to rely upon evidence which appears smooth, well integrated, and consistent in all respects. Thus, the Grand Jury may be unable to distinguish between prosecutions which are strong and those which are relatively weak.

Secondly, a defendant at trial may be, and in this case the defendants were confronted with testimony from witnesses who did not testify before the Grand Jury that returned the indictment, and thus, a defendant is foreclosed from exploring Grand Jury testimony for statements inconsistent with trial testimony. This highly reasonable and rational requirement that the United States Attorney not rely upon hearsay evidence when direct evidence is available was a recent holding of the Second Circuit Court of Appeals in United States v. Arcuri, 405 F.2d 691, 964 (2nd Cir. 1968). In the absence thereof, the function of the Grand Jury below was to act as a mere rubber stamp for the office of the United States Attorney, a function this Honorable Court should not condone.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CARL THOMPSON, *Defendant-Appellant.*	No. 73-1847
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. STEVEN TERESI, JR., *Defendant-Appellant.*	No. 73-1018

[March 12, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and TRASK, Circuit Judges, and
JAMESON,* District Judge

TRASK, Circuit Judge:

Following a jury trial, appellants Teresi and Thompson were convicted of violating 21 U.S.C. § 176(a), which made unlawful conspiring to import marijuana into the United States.[1] After examining each allegations of error asserted by appellants, we find

*Honorable William J. Jameson, Senior United States District Judge, for the District of Montana, sitting by designation.

[1]The statute was repealed in 1970. Act of Oct. 27, 1970, Pub. L. No. 91-513, tit. III, pt. B, § 1101(a)(2), 84 Stat. 1291.

that the proceedings below were free from any prejudicial error and affirm both convictions.[2]

Appellants were indicted with three other individuals on July 14, 1971, for conspiring to smuggle marijuana during the years 1969-1971. As demonstrated at the trial, however, the actual duration of the conspiracy extended from November 1969 to February 1970.

Prior to the trial, one defendant, Moore, pleaded guilty and became a Government witness. In addition to Moore, several coconspirators who had not been indicted testified that in 1969 Thompson had instructed them to engage boats which could be employed in smuggling marijuana; that in January 1970, Thompson, Moore, and Teresi went to Mexico to supervise the shipment of marijuana; and that, although the marijuana was subsequently transferred to another boat, the shipment was eventually delivered to Long Beach, California, where, on or about February 11, 1970, it was distributed by Thompson, Teresi, and Moore. In 1971, appellants were arrested and charged with conspiracy to smuggle marijuana. The marijuana in question was never seized by the Government and, accordingly, no marijuana was introduced as evidence at appellants' trial.

On appeal, both Thompson and Teresi contend that it was erroneous not to dismiss the indictment since, allegedly, portions of the grand jury proceedings were not recorded. In addition, Teresi challenges the adequacy of discovery accorded him in this case, the District Court's denial of his motion for a new trial without an evidentiary hearing, and the propriety of the instructions given to the jury.

Selective Recordation of Grand Jury Proceedings

Prior to the commencement of grand jury proceedings, appellant Thompson, through counsel, wrote to the United States Attorney and requested that all such proceedings be recorded.

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[2]At oral argument, counsel for appellant Teresi asserted his belief based upon unofficial information that Teresi is now deceased. Counsel was given 10 days within which to verify this belief. No such verification has been submitted to the court, and we decline to assume the existence of Teresi's death as fact.

Relying upon *United States v. Thoresen*, 428 F.2d 654, 665-66 (9th Cir. 1970), both appellants argue that any failure to comply with this request "should not be tolerated" by this court. Appellants allege that there was selective recordations; specifically, that there was testimony by federal investigative agents which was not recorded. This is wholly speculative; indeed, the Government answers that the "testimony of every witness who appeared before the Grand Jury in this case was recorded."[3] Even if one assumes the presence of selective recordation, however, the appellants have failed to demonstrate the "clear indication" of prejudice that *Thoresen* requires before an indictment may be dismissed for failure to record grand jury proceedings. *Thoresen*, *supra* at 666; *accord*, *United States v. Price*, 474 F.2d 1223, 1226 (9th Cir. 1973). Appellants speculate that a Government agent testified before the grand jury. Even if this were true, no such agent testified at the appellants' trial. In this regard, it is instructive to contrast this case with *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967), in which selective recordation, similar to that alleged here, was severely criticized. 383 F.2d at 24-25 (dictum). The prejudice in *Lenske* was clear: The agent who had testified at the grand jury proceedings did, in fact, later testify at the defendant's trial; the lack of recorded grand jury testimony precluded effective cross-examination. *Id.* In the present case defendants' counsel acknowledged at oral argument that copies of the transcripts of all trial witnesses who had testified before the grand jury were submitted to the trial court and to defense counsel a day or so before trial. They were therefore available to the defense for examination while the witnesses were available for cross-examination. *Dennis v. United States*, 384 U.S. 855, 875 (1966).

Appellants also seek to establish prejudice attributable to alleged nonrecordation by conjecturing that the grand jury was presented hearsay testimony prior to the return of its indictment. It is true that in *United States v. Arcuri*, 405 F.2d 691 (2d Cir.

[3]Brief of Appellee, United States v. Thompson, at 6; Brief of Appellee, United States v. Teresi, at 7, making reference to pages of the reporter's transcript of the trial where defendants' counsel referred to grand jury testimony in cross-examination.

1968), *cert. denied*, 395 U.S. 913 (1969), and *United States v. Gramolini*, 301 F. Supp. 39 (D.R.I. 1969), the deliberate use of hearsay before the grand jury, when direct testimony was available, was criticized and recognized as a possible basis for dismissal of the indictment. 405 F.2d at 693-94; 301 F. Supp. at 42-43. In this case, however, there has been no showing that hearsay testimony was so used; indeed, the Government notes that several participants in the conspiracy testified before the grand jury. Nonetheless, this circuit has not yet so limited *Costello v. United States*, 350 U.S. 359 (1956), wherein an indictment issued by a grand jury before which only hearsay testimony was elicited was held sufficient. *See United States v. Fox*, 425 F.2d 996, 1001 (9th Cir. 1970). Thus, even if hearsay testimony was presented before this grand jury, in order for an indictment procured partially by incompetent evidence to be dismissed on appeal, *Fox* requires a showing that the trial court abused its discretion in failing to do so. *Id.* Given the presence here of substantial direct evidence before the grand jury, such a showing has not been made.

Appellants further contend that partial nonrecordation in this case resulted in prejudice since, at their trial, they were "confronted with testimony from witnesses who did not testify before the grand jury." On the contrary, there is no requirement that all witnesses who testify at a trial must previously testify before the grand jury which indicts the defendant. *United States v. Nasse*, 432 F.2d 1293, 1305 (7th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

Adequacy of Discovery

Since there had been no seizure of marijuana in this case, there were no scientific tests on the substance that could be discovered by appellant Teresi. Furthermore, as will be discussed *infra*, the presence of marijuana was not material to this prosecution for *conspiracy* to smuggle marijuana. Hence, Teresi's request to discover the results of any tests made on the substance did not satisfy the "relevancy" requirement of Fed. R. Crim. P. 16(a) or the "materiality" requirement of Fed. R. Crim. P. 16(b).

The denial of appellants' pretrial motion for disclosure of grand jury testimony was proper since there was no demonstra-

tion of any "particularized need" to examine the testimony at that time.[4] *Dennis v. United States*, 384 U.S. 855, 872-73 (1966); *United States v. Parker*, 469 F.2d 884, 888-89 (10th Cir. 1972); *United States v. Cole*, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972). Counsel for appellants were provided copies of relevant testimony before the grand jury during the course of the trial and in time to facilitate effective cross-examination. Absent any express need for earlier disclosure, this was all that was necessary. *Dennis, supra* at 875.

The District Court's denial of Teresi's motion for a witness list was not erroneous; in a noncapital case such as this, there is no entitlement to such a list prior to trial. *United States v. Glass*, 421 F.2d 832, 833 (9th Cir. 1969). Appellant Teresi further objects to the "concealment" of certain Government witnesses during pretrial proceedings. The seclusion of such witnesses, however, was consistent with the lack of any requirement to disclose the identities of Government witnesses prior to trial. *United States v. Glass, supra*. Such a procedure is also properly authorized by Fed. R. Crim P. 16(d), (e).

Teresi alleges that it was erroneous to deny him the opportunity, upon cross-examination of "the government witnesses," to discover the current addresses of these witnesses. The appellee answers that such an objection was made during the trial, but was made with regard to only one witness. Indeed, this is consistent with the relevant motion filed by Teresi below. C.T. at 155. The appellee further represents that this information was provided to the appellant.[5] Assuming that the information was not so provided, however, the foreclosure of this inquiry on cross-examination, although erroneous, *Smith v. Illinois*, 390 U.S. 129 (1968), was harmless. In *Smith*, the "only real question at the trial" was the relative credibility of the defendant and the prosecution witness whose address was not disclosed. *Smith, supra* at

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[4]In appellants' Motion for Pretrial Discovery, counsel merely stated that he "seeks these transcripts and records in order to prepare, among other things, for the trial as well as the motion to dismiss." C.T. at 44. This contrasts sharply with the "particularized need" evident in *Dennis*. *Dennis, supra* at 872-73.

[5]Brief of Appellee, United States v. Teresi, at 11.

130. Here, in addition to the witness whose address was sought, eight accomplices testified as Government witnesses at Teresi's trial.

Denial of Teresi's Motion for a New Trial

The decision whether or not to conduct an evidentiary hearing to consider a motion for a new trial is a matter of discretion. *United States v. Clay*, 476 F.2d 1211, 1216 (9th Cir. 1973). Moreover, for a new trial motion to be granted, the movant must show that the newly discovered evidence is not merely cumulative and would "probably produce an acquittal." *Id.* at 1215. Teresi's "newly discovered evidence" was a possibility that two witnesses, in exchange for their testimony, had been promised a dismissal of criminal charges against them. The testimony of these two witnesses was not significant as to appellant Teresi.[6] Given the presence of other testimony sufficiently establishing the existence of the conspiracy, and Teresi's participation in it, one cannot say that the use of the "newly discovered evidence" to attempt to impeach the credibility of these witnesses would, even if the impeachment were successful, "probably produce an acquittal." Appellant's motion for a new trial was properly denied. *Cf. Remmer v. United States*, 347 227 (1954).

Teresi's Jury Instructions

Appellant requested a jury instruction to the effect that, if the jury should find his codefendant Thompson not guilty by reason of insanity,[7] then Teresi could not be considered a member of the conspiracy until it was shown that Teresi had conspired with one who was mentally competent. Since Thompson was found guilty, the refusal to give this instruction, even if assumed to be erroneous, was harmless. *Kotteakos v. United States*, 328 U.S. 750,

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[6]*See* R.T. at 2029-30. The witnesses, Nicholas and Edward Saenz, testified primarily about several meetings that they had attended with Thompson and other unindicted coconspirators in which plans to smuggle marijuana were discussed.

[7]Thompson's defense below was that, at the time these smuggling activities occurred, he was legally incompetent because of extensive drug usage.

764-65 (1946); *Sang Soon Sur v. United States*, 167 F.2d 431, 433 (9th Cir. 1948).

Teresi also appeals the denial of his requested instruction that the object smuggled as a result of this conspiracy must have been proved to have been marijuana. Appellant contends that, since this is a specific intent charge to violate the federal narcotics law, "there could be no conspiracy to violate the marijuana laws" unless the substance in question was in fact marijuana. Yet the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent such may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. *United States v. Rabinowich*, 238 U.S. 78, 86-88 (1915); *Toliver v. United States*, 224 F.2d 742, 744 (9th Cir. 1955). Thus, whether or not the substance involved was marijuana is irrelevant. Accordingly, although the jury received inconsistent instructions concerning the necessity for proof of actual marijuana,[8] this was harmless error. *Ryan v. United States*, 278 F.2d 836, 839 (9th Cir. 1960).

Teresi further contends that he was entitled to a jury instruction which would indicate that 18 U.S.C. § 371 (the general conspiracy statute) was a lesser included offense of 21 U.S.C. § 176(a) (conspiracy to smuggle marijuana). Since both these statutes might be applied to the same criminal conduct, the particular statute (21 U.S.C. § 176(a)) renders the other, general statute irrelevant. *Conerly v. United States*, 350 F.2d 679, 681-82 (9th Cir. 1965), *cert. denied*, 382 U.S. 1018 (1966); *Enzor v. United States*, 262 F.2d 172, 174 (5th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959).

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[8]At one juncture the court charged the jury:

> "[P]roof that marijuana was in fact obtained or imported is not required, it being sufficient if the plaintiff prove beyond a reasonable doubt that defendants knowingly and intentionally conspired to do any of the acts forbidden by the statute." R.T. at 2083.

Subsequently, however, the court stated:

> "In the indictment it is alleged that a particular amount or quantity of marijuana was involved. The evidence in the case need not establish that the amount or quantity of marijuana was as alleged in the indictment, but only that some measurable amount of marijuana was in fact the subject of the acts charged in the indictment." R.T. at 2091.

Appellant's final argument relates to the denial of his requested entrapment instruction. Since Teresi did not admit the acts constituting the crime charged, however, the defense of entrapment was not available to him. *United States v. Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972).

The convictions of both appellants are affirmed.

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APPENDIX B

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UNITED STATES COURT OF APPEALS

DOCKETED

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

vs.) No. 73-1847

CARL THOMPSON,) O R D E R

Defendant-Appellant.)

Before: ELY and TRASK, Circuit Judges, and JAMESON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

*Honorable William J. Jameson, Senior United States District Judge, for the District of Montana, sitting by designation.

MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1769

CARL THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6622

STEVEN TERESI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the indictment should have been dismissed because portions of the grand jury proceedings were not recorded. Petitioner Teresi contends that he was denied adequate discovery; that he was erroneously denied a new trial without an evidentiary hearing; and that the court erred in failing to give requested jury instructions.

After a jury trial petitioners and three co-defendants were convicted of conspiring to import tons of marijuana into the United States, in violation of 21 U.S.C. (1964 ed.) 176a. Petitioners were sentenced to

559-884—74——1

terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A; 493 F. 2d 305).[1]

During the trial, several unindicted co-conspirators and one Alexander Moore, a defendant who had previously pleaded guilty, testified for the government. Their testimony showed that in late 1969 petitioner Thompson had instructed them to engage boats for use in smuggling marijuana. In January 1970, Thompson, petitioner Teresi, and Moore went to Mexico to supervise the smuggling operation. The shipment of marijuana arrived by sea in Long Beach, California, where petitioners and Moore distributed it on February 11, 1970. The marijuana in question was never seized by the government.

1. Petitioners contend that the grand jury proceedings were selectively recorded, in violation of *United States* v. *Thoreson*, 428 F. 2d 654, 665 (C.A. 9). But as indicated by the court of appeals (Pet. App. A, p. 3; 493 F. 2d at 308):

> * * * [T]he Government answers that the "testimony of every witness who appeared before the Grand Jury in this case was recorded." Even if one assumes the presence of selective recordation, however, the [petitioners] have failed to demonstrate the "clear indication" of prejudice that *Thoresen* requires before an indictment may be dismissed for failure to record grand jury proceedings. *Thoresen, supra,* [478

[1] The court of appeals affirmed on March 12, 1974. A petition for rehearing in No. 73-1769 was denied on April 24, 1974. The petitions in Nos. 73-1769 and 73-6622 were filed on May 25, 1974, and April 25, 1974, respectively, and are out of time under Rule 22(2) of the Rules of this Court. "Pet. App. A" refers to Appendix A of the petition in No. 73-1769.

> F. 2d] at 666; *accord, United States* v. *Price,* 474 F. 2d 1223, 1226 (9th Cir. 1973). [Petitioners] speculate that a Government agent testified before the grand jury. Even if this were true, no such agent testified at [their] trial. * * * [D]efendants' counsel acknowledged at oral argument that copies of the transcripts of all trial witnesses who had testified before the grand jury were submitted to the trial court and to defense counsel a day or so before trial. They were therefore available to the defense for examination while the witnesses were available for cross-examination. *Dennis* v. *United States,* 384 U.S. 855, 875 (1966). [Footnote omitted.]

Petitioners also seek to establish prejudice attributable to alleged nonrecordation by conjecturing that the grand jury was presented hearsay testimony prior to the return of its indictment. *Costello* v. *United States,* 350 U.S. 359, however, established that an indictment issued by a grand jury before which only hearsay testimony was elicited may be sufficient. There is no showing in the instant case that the trial court abused its discretion in failing to dismiss the indictment. See *United States* v. *Fox,* 425 F. 2d 996, 1001 (C.A. 9).

Moreover, petitioner Thompson's suggestion that the recorded grand jury testimony of government trial witnesses which the prosecution turned over to the defense was given before a grand jury other than the one which indicted petitioners is merely speculative, as is his assertion that the grand jury heard only the

hearsay testimony of a government agent. Seven of petitioners' accomplices appeared before the grand jury which returned the indictment and all their testimoney was recorded. Petitioners were furnished with the grand jury testimony of all government trial witnesses.

2. Petitioner Teresi's contentions concerning the adequacy of discovery are unwarranted. Teresi's request to discover the results of any tests made on the marijuana did not satisfy the "relevancy" requirement of Fed. R. Crim. P. 16(a) or the "materiality" requirement of Fed. R. Crim. P. 16(b), since there was no seizure of marijuana in this case and the presence of marijuana was not material to this prosecution for *conspiracy* to smuggle marijuana.

The denial of Teresi's pretrial motion for disclosure of grand jury testimony was proper since there was no demonstration of any "particularized need" to examine the testimony at that time.[2] *Dennis* v. *United States,* 384 U.S. 855, 872–873; *United States* v. *Parker,* 469 F. 2d 884, 888–889 (C.A. 10); *United States* v. *Cole,* 449 F. 2d 194, 198 (C.A. 8), certiorari denied, 405 U.S. 931. Counsel for petitioners were provided copies of relevant testimony before the grand jury during the course of the trial and in time to facilitate effective cross-examination. Absent any express need for earlier disclosure, this was all that was necessary. *Dennis, supra,* 384 U.S. at 875.

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[2] In petitioners' Motion for Pretrial Discovery, counsel merely stated that he "seeks these transcripts and records in order to prepare, among other things, for the trial as well as the motion to dismiss." C.T. at 44. This contrasts sharply with the "particularized need" evident in *Dennis, supra,* 384 U.S. at 872–873.

The court's denial of Teresi's motion for a witness list was not erroneous; in a noncapital case such as this, there is no entitlement to such a list prior to trial. *United States* v. *Glass,* 421 F. 2d 832, 833 (C.A. 9). Teresi further objects to the "concealment" of certain government witnesses during pretrial proceedings. The seclusion of such witnesses, however, was consistent with the lack of any requirement to disclose the identities of government witnesses prior to trial. *United States* v. *Glass, supra.* Such a procedure is also properly authorized by Fed. R. Crim. P. 16(d), (e).

Teresi next alleges that it was erroneous to deny him the opportunity, upon cross-examination of "the government witnesses," to discover the current addresses of these witnesses. The United States Attorney asserted in the court of appeals, however, that this information was provided to petitioner. The court of appeals concluded (Pet. App. A, p. 5; 493 F. 2d at 309) that even assuming that the information was not provided, the foreclosure of this inquiry on cross-examination, although erroneous, *Smith* v. *Illinois,* 390 U.S. 129, was harmless. In *Smith,* the "only real question at the trial" was the relative credibility of the defendant and the prosecution witness whose address was not disclosed, *Smith, supra,* 390 U.S. at 130.

3. In rejecting petitioner Teresi's contention that the district court erroneously denied his motion for a new trial, the court of appeals correctly ruled (Pet. App. A, p. 6; 493 F. 2d at 310):

> The decision whether or not to conduct an evidentiary hearing to consider a motion for a new trial is a matter of discretion. *United States* v. *Clay*, 476 F. 2d 1211, 1216 (9th Cir. 1973). Moreover, for a new trial motion to be granted, the movant must show that the newly discovered evidence is not merely cumulative and would "probably produce an acquittal." *Id.* at 1215. Teresi's "newly discovered evidence" was a possibility that two witnesses, in exchange for their testimony, had been promised a dismissal of criminal charges against them. The testimony of these two witnesses was not significant as to appellant Teresi. Given the presence of other testimony sufficiently establishing the existence of the conspiracy, and Teresi's participation in it, one cannot say that the use of the "newly discovered evidence" to attempt to impeach the credibility of these witnesses would, even if the impeachment were successful, "probably produce an acquittal." Appellant's motion for a new trial was properly denied. Cf. *Remmer* v. *United States*, 347 U.S. 227 * * * (1954). [Footnote omitted.]

4. Finally, with respect to petitioner Teresi's contention that the court erred in failing to give the requested jury instruction as to his co-defendant's mental competence, the court below said (Pet. App. A, pp. 6–7; 493 F. 2d at 310):

> [Petitioner] requested a jury instruction to the effect that, if the jury should find his co-defendant Thompson not guilty by reason of insanity, then Teresi, could not be considered a member of the conspiracy until it was shown that Teresi had conspired with one who was mentally competent. Since Thompson was found guilty, the refusal to give this instruction, even

if assumed to be erroneous, was harmless. *Kotteakos* v. *United States,* 328 U.S. 750, 764–765 * * * (1946); *Sang Soon Sur* v. *United States,* 167 F. 2d 431, 433 (9th Cir. 1948).

Petitioner Teresi also contends that the court erred in denying his requested instruction that the object smuggled as a result of this conspiracy must have been proved to be marijuana. The crime of conspiracy, however, is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent in themselves they may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. *United States* v. *Rabinowich,* 238 U.S. 78, 86–88; *Toliver* v. *United States,* 224 F. 2d 742, 744 (C.A. 9). Thus, whether or not marijuana was in fact obtained is irrelevant.

Petitioner Teresi also contends that he was entitled to a jury instruction which would indicate that 18 U.S.C. 371 was a lesser included offense of 21 U.S.C. 176a (conspiracy to smuggle marijuana). But since both these statutes might be applied to the same criminal conduct, the particular statute (21 U.S.C. 176a) prevails over the general one. *Conerly* v. *United States,* 350 F. 2d 679, 681–682 (C.A. 9), certiorari denied, 382 U.S. 1018; *Enzor* v. *United States,* 262 F. 2d 172, 174 (C.A. 5), certiorari denied, 359 U.S. 953.

Petitioner Teresi's final argument relates to the denial of his requested entrapment instruction. Since Teresi did not admit the acts constituting the crime charged, however, the defense of entrapment was not available to him. *United States* v. *Hendricks,* 456 F. 2d 167, 169 (C.A.).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974